

The Administrative Law Judge found claimant sustained personal injury by accident arising out of and in the course of his employment through the period of February 1, 1992 through September 22, 1992. As a result of that finding, the Special Administrative Law Judge also found claimant provided timely written claim for benefits. The respondent requests the Appeals Board review those findings, along with the issue of the nature and extent of disability. The claimant requests the Appeals Board also review the issue of the average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

The claimant has proven he sustained a back injury while working for the respondent on or about February 1, 1992. However, the evidence fails to establish that claimant sustained any injury after that date. Therefore, the written claim served on respondent in October 1992 is untimely, and the Award of the Special Administrative Law Judge should be set aside.

K.S.A. 44-520a requires written claim for compensation to be served upon the respondent within two-hundred (200) days after the date of accident, or within two-hundred (200) days after the date of last payment of compensation or furnishing of medical care, whichever is later. The parties acknowledge claimant completed and filed the Director's Form E-1, Application for Hearing, in October 1992, and a second Form E-1 in April 1993. Because the record is silent regarding other documents which could possibly serve as written claim, in order for claimant to prevail in this proceeding he must prove either he sustained injury within two-hundred (200) days preceding the filing of the first Form E-1 or he received compensation or medical treatment within that period. However, claimant has failed to carry that burden.

Claimant was evaluated in June 1993 by Ernest R. Schlachter, M.D., who diagnosed claimant as having chronic lumbosacral sprain with disc disease at the L5-S1 intervertebral level. Dr. Schlachter took a history of injury from claimant. The only incident of injury recorded by Dr. Schlachter is when claimant slipped on ice and fell while unloading materials from a forklift. Dr. Schlachter's history is entirely devoid of any mention of injury or increased symptomatology after February 1992. One of claimant's treating physicians, neurosurgeon Greg M. Snyder, M.D., also testified. Dr. Snyder also took a history from claimant regarding his back injury. Similar to Dr. Schlachter's, Dr. Snyder's history is also devoid of any reference or finding of injury after the initial accident. Although claimant tried to obtain testimony from Dr. Snyder that claimant's work activities after February 1992 would have aggravated his injury, the hypothetical question posed to the doctor assumed facts not in evidence. Claimant testified he worked light duty and mowed after his return to work in February 1992. However, claimant's counsel asks the doctor to assume claimant was regularly lifting heavy weights and nothing was said regarding the mowing activities.

Without the crucial evidence regarding what effect, if any, claimant's work activities after February 1992 had upon his condition, the trier of fact is without evidence to determine whether claimant sustained injury or aggravation after February 1992, and, if an aggravation, whether the aggravation was temporary or permanent.

Because the evidence indicates claimant sustained injury on or about February 1, 1992, and received treatment for the injury for approximately one week after its occurrence, the Appeals Board finds the written claim served upon respondent in October 1992 was not timely. The fact claimant received additional treatment for his injury beginning in September 1992 does not assist claimant because it does not revive or otherwise extend

the period to make written claim. See Rutledge v. Sandlin, 181 Kan. 369, 310 P.2d 950 (1957).

Based upon the above, the remaining issues are rendered moot.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of benefits set forth in the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on June 23, 1994, should be, and hereby is, set aside. The orders of the Administrative Law Judge pertaining to claimant's attorney fees and the expenses of administration are hereby approved.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
John David Jurcyk, Lenexa, KS
Steven L. Foulston, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director